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In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

VIRGINIA

On Writ Of Certiorari To The
Supreme Court Of Virginia

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether in this capital case involving an extraordinary amount of potentially prejudicial pretrial publicity which the majority of the venire admitted having been exposed to, the Sixth, Eighth and Fourteenth Amendments permitted the trial court to refuse to conduct or permit any *voir dire* whatsoever regarding what the prospective jurors had read, heard, or seen about the case?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Virginia affirming petitioner's conviction and sentence of death is reported as *Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990), and is reproduced in the Joint Appendix (J.A.) at 95-124. The decision of the Virginia Supreme Court denying rehearing on April 20, 1990 is unreported, and is reproduced in the Joint Appendix at 126.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

Petitioner's conviction and sentence of death were affirmed by the Virginia Supreme Court on March 2, 1990. Rehearing was denied by the state court on April 20, 1990. The petition for writ of certiorari was filed in this Court on July 18, 1990. Certiorari was granted on October 9, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

This case also involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case involves the Due Process Clause of Section One of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Finally, this case involves Rule 3:14A(a) of the Rules of the Virginia Supreme Court, which states in relevant part:

> (a) Examination. – After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:
>
> (1) Is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;
>
> (2) Is an officer, director, agent or employee of the accused;
>
> (3) Has any interest in the trial or the outcome of the case;
>
> (4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;
>
> (5) Has expressed or formed any opinion as to the guilt or innocence of the accused;
>
> (6) Has a bias or prejudice against the Commonwealth or the accused; or
>
> (7) Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, the court, and counsel as of right, may examine on oath any prospective juror and ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

STATEMENT OF THE CASE

In 1973, when he was nineteen years old, petitioner was convicted of first degree murder in Grayson County, Virginia. He was sentenced to a term of imprisonment for 48 years for that offense. He has been incarcerated in the Virginia Department of Correction ever since. In the spring of 1988, he was assigned to Haymarket Unit 26, a minimum security institution in Prince William County, Virginia, and was working outside of the institution on a Department of Transportation work crew on September 22, 1988. The evidence at trial, as summarized by the Virginia Supreme Court, tended to show the following,

> When the work crew suspended operations for lunch, the defendant crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately a mile to Ashdale

Plaza, a shopping center. There, he entered Dale City Floors, a retail carpet store, and inquired of the operator, Mrs. Gladys Nopowsky, about oriental carpets.

The defendant challenged the prices she quoted, and a heated argument ensued. According to the defendant, she "started screaming . . . nigger this and nigger that" and "spit in [his] face." The defendant slapped her with his open hand, and she kicked him in the genitals. As the defendant fell to the floor, he "caught the top part of her pants" and pulled them "down right . . . by the thighs." Mrs. Nopowsky "slashed" at him with a steak knife. The defendant "pushed her off and . . . went straight for the shirt pocket and . . . came up and hit her in the chest and hit her up in the neck." "Blood was coming from the nose and mouth and . . . a trickle of blood . . . from the neck." The defendant "checked her pulse to make sure she was okay," placed a wet washcloth on the neck wound, and "took the sleeve of [his] shirt and . . . wiped her face." While searching for a first aid kit, the defendant found four dollars in coins. He explained that he left the store intending to use the coins to purchase ice from a vending machine located in the shopping center to apply to his victim's wounds. Changing his mind, he re-entered the store and "started wiping all the things that [he] could remember that [he] had touched." When he returned to the VDOT, he washed blood from his shoes, took off his bloody shirt, "put it in the trash bag and threw it in the trash can." He discarded the weapon used in the attack on the highway. The defendant testified that he had not raped his victim.

Mu'Min v. Commonwealth, 239 Va. at 437-39, 389 S.E.2d at 889-90; J.A. 96-98. The autopsy revealed that the victim

died from stab wounds. Petitioner was subsequently charged with this offense following an anonymous letter sent to the authorities by another inmate.

As the three dissenting justices of the Virginia Supreme Court noted, the case generated

> an unusual amount of pretrial publicity. The charge involved the alleged capital murder of a local resident by a convict who was serving a part of his sentence for first degree murder as a member of a road gang. After this murder, county officials and local citizens publicly expressed surprise, outrage, and fear for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public.

Mu'min v. Commonwealth, 239 Va. at 453, 389 S.E.2d at 899; J.A. 116-17. The press reports contained substantial prejudicial information which was not introduced into evidence at the guilt phase of petitioner's trial. *Id.*[1] Other information included in the stories was not admitted at either phase of the proceedings. For example, the media accounts included reports that:

- Petitioner was suspected of beating another inmate while awaiting trial for this offense;[2]

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[1] The case was covered not only by the local papers (*the Potomac News, the Weekly Messenger*, and *The Prince William Journal*) but also by *The Richmond Times* and *The Washington Post*.

[2] *See, e.g.*, App. 921; 942. One headline read: "Accused killer is suspect in beating." App. 921. This information was

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- Petitioner had 23 prison rule violation citations;[3]

- Petitioner had been rejected for parole six times;[4]

- Petitioner was convicted of the 1973 murder and robbery of a Grayson County cab driver. Details of the 1973 crime were included in the stories as was a statement from the Grayson County prosecutor to the effect that the death penalty was unavailable at the time of petitioner's earlier conviction as a result of this

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apparently released to the press on the command of the District Attorney. January 30 tr. 105.

The complete transcript of record was transcribed by court days and the pages are numbered accordingly. These transcripts are referred to in this brief by the date followed by "tr." and the page number. The appendix filed in the Supreme Court of Virginia in connection with petitioner's direct appeal to that court is referenced in this brief as "app."

[3] *See, e.g.*, App. 931; 942. One of the stories was headlined "Accused killer had history of prison trouble." App. 942. Furthermore, a Virginia Department of Corrections internal report, prepared in connection with this offense, was printed in its entirety in the local papers. This report contained a detailed account of petitioner's correctional record. App. 963-69. The reports did not indicate, however, that many of these violations were for minor transgressions of prison regulations such as refusing to serve pork to other inmates as a result of his religious beliefs, and standing improperly.

[4] *See, e.g.*, App. 923; 942. Petitioner was also described on numerous occasions as not being a "model prisoner." App. 923; 931.

Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972);[5]

- Petitioner's juvenile record in New York and Virginia.[6]

- Petitioner's had previously broken into a house and a car, and engaged in "Peeping Tom" activities while a prisoner. There were also reports that petitioner routinely left the work site and stole clothes, beer, and wine when he did so.[7]

- A rape may have been involved in the commission of this murder.[8]

- Petitioner was described as being "lustful" and as "doing strange things." Other accounts indicated petitioner had access to a VCR and watched pornographic movies in his bunk.[9]

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[5] *See, e.g.*, App. 948; 951. One headline in this connection stated: "Mu'Min avoided death for 1973 murder in Va." Petitioner was also repeatedly referred to in the press accounts as a "convicted murderer." *See, e.g.*, App. 925; 927; 929; 932; 949; 973.

[6] *See, e.g.*, App. 965-69.

[7] *See, e.g.*, App. 922; 930; 932; 963. These accounts also discussed allegations that inmates had access to weapons, liquor and drugs, that they intimidated guards, that inmates dressed in civilian clothes to "blend in," and that they routinely left the work site to go on "shoplifting sprees." The reports frequently referred to "lax supervision." One article discussing the incident was headlined: "Laxity was factor in sex killing." App. 922. The story went on to report that the husband of the victim intended to sue the state after petitioner's trial to make sure "it never happens again." *Id.*

[8] *See, e.g.*, App. 934; 951. Several headlines referred to the crime as a "Sex Killing." *See. e.g.*, App. 922.

[9] *See, e.g.*, App. 930; 961.

- Headlines and various accounts indicated that petitioner had confessed to the crime.[10]

There were also numerous citizen's editorials and letters to the editor about this case. These stories not only lauded the good character of the victim and her contributions to the community, but also expressed outrage that a violent offender could be allowed at large in the community. *See. e.g.*, App. 926; 930; 940-41.[11] For example, the writer of one article demanded protection from the "criminal element" which was "allowed to enter into our communities without regard to the public safety." App. 974. There were demands that all officials in any way associated with this debacle be immediately fired. *See, e.g.*, App. 930; 931; 937.

The barrage of publicity and public outrage occurred at a moment when incidents such as the one alleged here were the focus of especially intense national interest. The offense occurred in the fall of 1988, during the midst of the Bush/Dukakis presidential campaign. A crime committed in Maryland by another convicted murderer and inmate, Willie Horton, was a major theme in the campaign. Several of the stories regarding petitioner's offense discussed the Willie Horton case and the presidential election. See App. 970. One article stated that the Virginia prison furlough program was being suspended not only as a result of petitioner's offense but also because of "the climate created by the national presidential campaign."

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[10] *See, e.g.*, App. 975.

[11] One story contained the comments that: "she [the victim] was a sister to us," that talking about the crime "is too difficult for us," and that the "community will remember Gladys for what she was." App. 926.

Id. Other articles discussed petitioner's case in the context of other murders committed by inmates in the Virginia Department of Corrections. App. 974.

The press accounts following petitioner's case also depict a pointed response by high officials in the Virginia state government. The Secretary of the Virginia Department of Transportation, Vivian Watts, made a widely-reported public apology (on behalf of herself and the Governor) for the crime in which she stated: "I know this will not bring [Gladys] Nopowsky back to her family but we are deeply sorry." App. 927. Shortly after this, then Virginia Governor Balilles, suspended the Virginia work-release and trusty programs, to the accompaniment of great media fanfare. App. 923; 932; 934; 938; 970. Lieutenant Governor Wilder expressed his "revulsion" that such a thing could happen. App. 947. Local politicians referred to the case as "shocking" in their campaigns, with several using it as a paradigmatic example of allegedly pervasive shortcomings in the criminal justice system. App. 936; 980. Several pieces of legislation were introduced to bar inmates from being able to work in urban areas. App. 933; 958. The District attorney who ultimately prosecuted petitioner used the case as a rallying call for "swifter capital punishment," and further stated that "the penal system [was] . . . the weak link in the criminal justice system." App. 980.

As a result of this pervasive and extremely prejudicial publicity, trial counsel requested a change of venue. The trial judge conducted a hearing on January 30, 1989. Counsel pointed out the unprecedented volume of publicity, noting that petitioner's case had averaged one story a day and drew the judge's attention to the substantial

prejudicial information contained in the news accounts. A number of articles regarding the case were introduced into evidence at the hearing. Counsel noted that the articles gave the details of petitioner's 1973 offense. He also referred to the political nature of many of the stories including Governor Balilles' action in suspending the state's furlough program, statements by various candidates for office and various bills introduced in the Virginia legislature. The trial judge denied the motion, stating that it was his "considered opinion that we can get a fair and impartial jury." App. 108.[12] Another pretrial hearing was conducted on April 14, 1989. Petitioner's counsel submitted a list of proposed *voir dire* questions to determine whether the prospective jurors had read or heard anything about the case, and if so what. The relevant questions requested by trial counsel are set out in full below.

31. Have you acquired any information about this case, from the newspapers, television, conversations or any other source?
32. What have you seen, read or heard about this case?
33. From whom or what did you get this information?
34. When and where did you get this information?

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[12] The trial judge also remarked that, "I've heard it said that in this particular area in spite of the volume of papers that you can get a fair jury for anything that you want to." App. 107. He also remarked on one other occasion: "I think sometimes media people think that their stories get a whole lot more publicity than so." April 17 tr. 57; J.A. 71.

35. Have you discussed this case with anyone?
36. With whom?
37. When and where?
38. What did you discuss?
39. Have you formed an opinion or conclusion about this case?
40. What is it?
41. Has anyone expressed any opinion about this case to you?
42. Who? What? When? Where?

Letter to Trial Judge with proposed jury questions, App. 17-29; J.A. 2-7. Counsel also requested individual *voir dire* and additional peremptory challenges. April 14 tr. 15-16. The trial court ruled that counsel would be permitted to ask only whether they had heard, read, or seen anything about the case and whether that information would affect their prospective impartiality. Defense counsel were prohibited from inquiring about what information the juror had previously learned about the case, and about the content of their discussions with other individuals. App. 58; J.A. 15. In short, all of counsel's proposed content questions were refused. Tr. April 14 tr. 57-59; J.A. 31-32.[13]

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[13] Although the trial judge indicated that he was limiting the questions in accordance with Virginia Supreme Court Rule 14A, he permitted other questions which were not specifically set forth in the rule. For example, he permitted questions regarding whether any of the jurors lived within a mile of Ashland Plaza, the scene of the crime, and whether any of the

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The trial judge also denied petitioner's request for individual *voir dire*, expressing his view that individual questioning was akin to putting the jurors themselves on trial. App. 26; J.A. 17. He further denied counsel's motion for additional peremptory challenges, and to sequester the jury during the trial. J.A. 16-17.

Jury selection commenced on April 17, 1989. During jury selection, the trial judge asked the panel the following questions:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?
>
> Is there anyone who has acquired any information from the news media or from any other source?

April 17 tr. 16; J.A. 46. Sixteen of the original twenty panel members answered in the affirmative. April 17 tr. 16-18; J.A. 4647. The court then asked the following questions.

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you

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jurors had ever been a victim of a crime. App. 37; J.A. 20. The trial judge allowed some of these questions, despite his feeling that they were irrelevant, because "[i]ts not worth arguing over." April 14 tr. 37, 46; J.A. 19, 27. However, the record reflects that he strictly adhered to his prohibition of any questioning concerning pretrial publicity other than conclusory questions expressly authorized by Virginia Supreme Court Rule 3:14A.

> may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and await until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

April 17 tr. 18-19; J.A. 47-49. One of the 16 panel members who admitted to having prior knowledge of the case responded affirmatively to these questions and was dismissed for cause. April 17 tr. 21; J.A. at 48-49.[14] Petitioner's counsel requested that all jurors who indicated that they had been exposed to pretrial publicity be excused for cause. The basis of this motion was that as a result of the trial judge's denial of all content oriented *voir dire*, a fair and impartial jury could not be selected unless the jurors who indicated they had read about or

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[14] This juror responded to attempted rehabilitative questions as follows: "it would take an awful lot to change my mind." April 17 tr. 19; J.A. 48.

discussed the case with others were dismissed. April 17 tr. 51-52. This motion was denied, as was petitioner's renewed motion for a change of venue based on the pretrial publicity. April 17 tr. 54; J.A. 69-71.

Seven of the original panel of prospective jurors who indicated that they had heard, read, or seen something about the case were eventually seated on the jury that convicted Dawud Mu'min and recommended that he be sentenced to death. April 17 tr. 16-18, 197.[15] One other juror, Paul Tsou, who was placed on the panel after the above-mentioned strike for cause and who was eventually chosen as a juror, indicated during questioning that he had previously heard about the case and that he had discussed it with another individual. April 17 tr. 25, 197. As additional jurors were called to replace panel members who were excused for cause, most of these individuals also indicated they had read media accounts of the case. *See. e.g.*, April 17 tr. 104, 111, 130. Several of these individuals also ultimately served on petitioner's jury.

Petitioner's trial commenced later in the day on April 17, 1989. Based on the evidence presented, *see infra* at 3-5, the judge submitted to the jury several lesser included offenses of capital murder including first degree murder, second degree murder, and voluntary manslaughter. Petitioner was convicted of capital murder on April 20, 1989. Following a sentencing hearing, the jury recommended that he be sentenced to death. The jury deliberated for several hours on the issue of sentence and at one point

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[15] These jurors were: Carrington Boothe, Albert Runion, Sheila Waters, John Taylor, Rita Wolfe, Evelyn Thorpe, and Sandra Dame.

returned with a question regarding the meaning of a life sentence. The trial judge refused to answer the question. April 24 tr. 92. Shortly thereafter, the jury recommended that petitioner be sentenced to death. Before releasing the jury, the trial judge noted that there "are considerable media people in here," and "[t]his case has generated considerable media interest." April 24 tr. 98.[16] After taking the matter under advisement and reviewing a presentence report, the trial judge accepted the jury's recommendation and sentenced petitioner to death on June 12, 1989.

On appeal, petitioner contended that he was entitled to a new trial as a result of the judge's failure to permit the proposed *voir dire* questions. The Supreme Court of Virginia responded that while a criminal defendant may properly ask on *voir dire* whether a juror has previously acquired any information about the case, he does not have, under any circumstances, a constitutional right to explore the *content* of the acquired information. Rather, the majority concluded an accused is only entitled to know whether the juror can remain impartial in light of the previously obtained information. *Mu'Min v. Commonwealth*, 239 Va. 433, 443, 389 S.E.2d 886, 893 (1990); J.A. 103-04.

Justice Whiting wrote a dissenting opinion which was joined by two other justices. Justice Whiting concluded that under the unusual circumstances presented by petitioner's case, it was manifest error for the trial

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[16] He had made similar remarks through the trial. *See, e.g.*, April 17 tr. 194.

court to refuse to permit *voir dire* regarding what the prospective jurors had previously read or heard.[17] After noting the unusual amount of prejudicial pretrial publicity, the dissent concluded:

> The questions proffered by the accused, and refused by the court, were clearly designed to provide a factual and objective basis for assessing the potential for bias. Some prospective jurors may honestly have felt that the publicity had not affected their impartiality; however, a disclosure of what was actually remembered could lead an impartial observer to conclude that there was a bias of which the potential juror was unaware. . . . "Voir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984).

Mu'Min v. Commonwealth, 239 Va. at 457-58, 389 S.E.2d at 901; J.A. 121.

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[17] The dissent pointed to a number of matters contained in the publicity which were not introduced into evidence at the guilt-or-innocence phase of petitioner's trial. 239 Va. at 454, 389 S.E.2d at 899, J.A. 117-118. Furthermore, as is set out in detail *supra* at 33-34, many "facts" set forth in the press accounts were not introduced at the sentencing phase of petitioner's trial either.

SUMMARY OF ARGUMENT

The Sixth and Fourteenth Amendments guarantee every defendant the right to a fair and impartial jury. A jury's verdict, especially in a capital case, must be based solely upon the evidence admitted in open court, and cannot be shaped by outside influences. Adverse and excessive pretrial publicity can jeopardize this right. Thus, in a case attended by extraordinary publicity, a trial judge has an affirmative constitutional duty to take whatever steps are necessary to eliminate the adverse effects of that publicity. Adequate *voir dire* is one of the most basic steps. *Voir dire*, as this Court has recognized, aids in discerning bias and enables counsel to use challenges intelligently to obtain an impartial body of jurors.

Petitioner's case involved an exceptional amount of prejudicial pretrial publicity, which the majority of the panel and ultimately the majority of the petit jury that convicted petitioner and sentenced him to death had been exposed to. The trial judge, however, refused to permit any *voir dire* whatsoever regarding the content of the information to which the jurors had been exposed. This action precluded petitioner from selecting a fair and impartial jury. Under all the circumstances of this case, the trial judge was obligated to permit some inquiry into what the prospective jurors had read and heard about the case out of court. He did not, and for this reason the judgment of the Supreme Court of Virginia should be reversed.

ARGUMENT

UNDER ALL THE CIRCUMSTANCES OF THIS CASE, THE TRIAL JUDGE WAS UNDER AN AFFIRMATIVE CONSTITUTIONAL DUTY TO VOIR DIRE THE PANEL REGARDING THE CONTENT OF THE INFORMATION THAT PROSPECTIVE JURORS HAD BEEN EXPOSED TO.

A The Sixth, Eighth and Fourteenth Amendments Mandate that the Jury in a Capital Case be Impartial as to Both a Defendant's Guilt-or-Innocence and the Appropriate Punishment.

The jury occupies "a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).[18] To serve this function, the jury, as guaranteed by the Sixth Amendment, must be fair and impartial. The Due Process Clause of the Fourteenth Amendment requires, at a bare minimum, a "fair trial in a fair tribunal." *In Re Murchison*, 349 U.S. 133, 136 (1955). These constitutional guarantees of a fair trial by a panel of impartial, indifferent jurors, *see Turner v. Louisiana*, 379 U.S. 466, 472 (1965), govern every criminal case "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Groppi v. Wisconsin*, 400 U.S. at 509.[19]

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[18] This is so because, as this Court has stated: "[i]n the ultimate analysis, only the jury can strip a man of his liberty or his life." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971).

[19] *See also Irvin v. Dowd*, 366 U.S. 717 (1961):

> More than one student of society has expressed the view that not the least significant test of the quality

(Continued on following page)

The theory underlying these protections afforded by our constitutional system is simple and straightforward: the jury's verdict in any case must be "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen"); *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) ("[o]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial"); *Ham v. South Carolina*, 409 U.S. 524, 531 (1973); *Groppi v. Wisconsin*, 400 U.S. at 509; *Sheppard v. Maxwell*, 384 U.S. 333, 351

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> of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him."

Id. at 729 (Frankfurter, J., concurring).

(1966); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Thus the quest for an impartial jury required by the Sixth and Fourteenth Amendments is for "jurors who will conscientiously apply the law and follow the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). In the words of Lord Coke, a juror must be "indifferent as he stands unsworne," Co. Litt. 155b, and the basic theory underlying our system of criminal justice is that a juror whose evaluation of the evidence is likely to be jaundiced by prejudgment cannot be impartial. *See Reynolds v. United States*, 98 U.S. 145, 146 (1878). As this Court has recognized, this requirement goes to "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. at 472. Whenever circumstances surrounding a jury trial threaten to "undermine the fairness of the factfinding process" by allowing the influence of prejudgment to "dilut[e] . . . the principle that guilt is to be established by probative evidence and beyond a reasonable doubt[,] . . . the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976).

This Court has recognized that adverse and excessive pretrial publicity can jeopardize a defendant's right to a fair and impartial jury. *See Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial"); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 378 (1979); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 552-54 (1976); *Sheppard v. Maxwell, supra; Irvin v. Dowd, supra;*

Estes v. Texas, 381 U.S. 532 (1965);[20] *Rideau v. Louisiana*, 373 U.S. 723 (1963). Thus, in cases surrounded by intensive publicity, this Court has placed an "affirmative constitutional duty" on trial judges to take whatever steps are necessary to eliminate the effects of the publicity on the defendant's right to a fair and impartial jury. *Gannett Co.*, 443 U.S. at 378; *see also Chandler v. Florida* 449 U.S. at 574 (when publicity is intense, "[t]rial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and relevant law"); *Nebraska Press Association v. Stuart*, 427 U.S. at 555 ("the trial judge has a major responsibility" to mitigate the effects of adverse pretrial publicity); *Sheppard v. Maxwell*, 384 U.S. at 363 ("[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, trial courts must take strong measures to ensure that the balance is never weighed against the accused"); *Frazier v. United States*, 335 U.S. 497, 511 (1948).[21]

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[20] In *Estes*, this Court noted:

> While maximum freedom must be allowed the press in carrying out this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.

381 U.S. at 539.

[21] *See also Frank v. Mangum*, 237 U.S. 309, 349 (1915) ("[a]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.") (Holmes, J. dissenting).

These principles apply with special force in capital cases. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983). And the Court has struck down capital sentences when it found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.' " *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring in part and concurring in judgment) (citation omitted). In sum, the state must assure reliability in the process by which a person's life is taken. *See Gregg v. Georgia*, 428 U.S. 153, 189, 196-206 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979); *Beck v. Alabama*, 447 U.S. 625 (1980); *Turner v. Murray*, 476 U.S. 28 (1986); *Penry v. Lynaugh*, ___U.S.___, 109 S.Ct. 2934 (1989).

It is for this reason that for almost one hundred years, the Constitution has required that when the government seeks to exact upon a defendant the ultimate penalty, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892); *see also Irvin v. Dowd*, 366 U.S. at 728 ("with his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . . . "); *Aldridge v. United States*, 283 U.S. 308, 314 (1931) (risk in denying adequate *voir dire* is "most grave when the issue is of life or

death"). Compared to jurors in non-capital cases, who must weigh evidence against an exacting standard of proof, the juror in a capital sentencing proceeding faces a uniquely different task. A capital sentencing jury's task is inherently subjective as it essentially makes a moral judgment and acts as the conscience of the community. *See California v. Brown*, 479 U.S. 538, 542 (1987) (O'Connor, J. concurring); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986)[22]; *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

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[22] In *Turner*, this Court noted that capital sentencing proceedings are uniquely vulnerable to the infection of racial prejudice. The Court also noted that the Virginia capital sentencing scheme allows for substantially more discretion than other systems sanctioned by the Court. 476 U.S. at 34. Even if a Virginia jury finds an aggravating circumstance, it may still, in its discretion, recommend not to impose the death penalty. *Id.* Thus the Court concluded that the failure to conduct *voir dire* in Turner's case regarding potential juror's racial bias violated the Eighth Amendment, and vacated his sentence of death.

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether Petitioner's crime involved the aggravating factors specified under Virginia law. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of Petitioner's crime, might incline a juror to favor the death penalty. The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.

476 U.S. at 35-36

B. The constitutional right to a fair and impartial jury requires a trial judge to take appropriate steps to protect the right.

Of course, the impartiality of jurors is not a technical conception and can never be reduced to any particular formula; rather it is a state of mind, a "mental attitude of appropriate indifference." *United States v. Wood*, 299 U.S. 123 (1936). It is for this reason that any juror's competence "ultimately depends on an assessment of his [or her] qualifications and ability impartially to consider evidence presented at trial." *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (citation omitted). While the Constitution may not lay down any particular tests or procedures to determine this attitude of "appropriate indifference," *see Frazier v. United States*, 335 U.S. 497 (1948), one principle cannot be disputed: the right to an impartial jury necessarily carries with it the concomitant obligation on the trial judge's part to take reasonable steps to insure the jurors' ability to serve without bias in a given case. Thus "the preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950).

That opportunity must include "searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence." *Nebraska Press Association v. Stuart*, 427 U.S. at 564. For this Court has repeatedly held that the inquiry cannot stop with a prospective juror's own pronouncement that he or she is sensible of no prejudgment or bias. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) ("[n]o doubt each juror was sincere when he said that he wanted to be fair and impartial to [the defendant] . . . , but the psychological impact requiring

such a declaration before one's fellows is often its father"); *Murphy v. Florida*, 421 U.S. 794, 800 (1975) ("the juror's assurances that he is equal to [the] . . . task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality' "); *Patton v. Yount*, 467 U.S. 1025, 1031 (1984) ("adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed"). Thus, when a juror asserts on *voir dire* that he or she can be impartial, the question "should the juror's protestation of impartiality [be] . . . believed" must be resolved by a factual finding of the court. *Id.* at 1036. On this issue, as on any other factual question decisive of federal constitutional rights, the defendant has a federal constitutional right to make an adequate record. *See. e.g., Carter v. Texas*, 177 U.S. 442 (1900); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553 (1972) (per curiam).

Meaningful *voir dire* is the primary method which our system of criminal justice relies upon to identify juror bias. *Patton v. Yount*, 467 U.S. at 1030; *see generally* 5 Wigmore, *Evidence*, §1367 (3d ed. 1940); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545 (1975). *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury is not transgressed. *Voir dire* examination is frequently essential to enable the court and the parties to choose a jury "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. at 217. Furthermore, *voir dire* "serves to protect the right

[to a fair and impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 554.[23]

It is for these reasons that the Court has recognized that without an adequate *voir dire*, the trial judge cannot fulfill his responsibility to remove prospective jurors who are not able to impartially follow the court's instructions and evaluate the evidence presented at trial. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Connors v. United States*, 158 U.S. 408, 413 (1895). To shirk this constitutional responsibility destroys both the reality and the appearance of fairness. *See Aldridge v. United States*, 283 U.S. 308, 315 (1931) ("[w]e think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrespect."); *see also Rosales-Lopez v. United States*, 451 U.S. at

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[23] *See also* Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245, 249 (1981).

> [Voir dire is critical because] the rules of evidence can only partly limit the extent to which a juror's bias affects his deliberation. The tests which the law furnishes to the jury for weighing evidence are crude and imperfect and provide few internal checks on jury prejudice. There is a critical area in every case, where a juror must rely on his own experience to reach a decision. If bias permeates a juror's thinking, it may distort the importance of evidence consistent with it. . . . Bias may, therefore, be a fact of singular importance in the case.

188; *Sheppard v. Maxwell*, 384 U.S. at 352 (" 'our system of law has always endeavored to prevent even the probability of unfairness' "); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

While trial courts have considerable discretion to limit *voir dire*, in exercising that discretion the "trial judge must be zealous to protect the rights of an accused." *Dennis v. United States*, 339 U.S. 162, 168 (1950). The procedures required may vary from case to case, but the particular procedures employed must always be guided by "the essential demands of fairness." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Ristaino v. Ross*, 424 U.S. 589, 596 (1976); *Aldridge v. United States*, 283 U.S. at 473. In the words of the first Justice Harlan, "[a]ny system for the impaneling of a jury that prevents or embarrasses the full unrestricted exercise of the right to [select a fair and impartial jury] must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

In other words, there are limits on the trial court's discretion in this area. *Ristaino v. Ross*, 424 U.S. at 596. This is the essential teaching of the Court's decision in *Ham v. South Carolina*, 409 U.S. 524 (1973). *Ham* involved the state court-prosecution of a young, bearded, black civil rights worker for possession of marijuana. Ham maintained that he had been framed on the drug charge as a result of his civil rights work, and thus sought to inquire whether any member of the jury was prejudiced against black persons or persons with beards. In *Ham*, as in petitioner's case, while the trial judge asked several general questions regarding bias and prejudice, he declined to inquire into particular grounds of bias. This

Court held that, on the facts of that case, the general questions propounded by the trial court were constitutionally inadequate and that "the Fourteenth Amendment required the judge . . . to interrogate the jurors regarding racial prejudice." *Id.* at 527.[24]

Ham recognized that the right to challenge has little or no meaning if it is unaccompanied by the right to ask or ask for relevant questions on *voir dire*. *Ham* therefore held that the latter right arises whenever, under all the circumstances, there is a likelihood that, absent adequate questioning, the jurors will be partial. *Ham* established that the opportunity for questioning on *voir dire* must be sufficient to reasonably test potential jurors for bias or partiality. *Id.* at 527; *see also United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964). If the inquiry is so restricted by the trial judge that the defendant is denied a fair chance to demonstrate bias and partiality on the part of prospective

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[24] The Court held that it was not constitutional error to fail to *voir dire* the jury regarding bias against persons with beards. *Ham* also sought to raise the issue whether it was error for the trial court to refuse to inquire about allegedly prejudicial pretrial publicity. The Court concluded this was not a cognizable claim in Ham's case because:

> the record before us contains neither the newspaper articles nor any description of the television program in question. Because of this lack of material in the record substantiating any pretrial publicity prejudicial to this petitioner, we have no occasion to determine the merits of his request to have this question posed on *voir dire*.

Id. at 528 (footnote omitted).

jurors, the Sixth and Fourteenth Amendments are violated. *See also Dennis v. United States*, 339 U.S. at 171-72. While the constitutional requirement cannot be reduced to any particular formula, it is clear that if the circumstances of a particular case strongly suggest the need for specific questioning, a defendant's Sixth and Fourteenth Amendment right to impanel an impartial jury is abridged by a trial judge's refusal to allow such questioning. *Ristaino v. Ross*, 424 U.S. at 596-97.

Ham is not limited, as respondent may argue, to cases involving the possibility of racial bias. This was implicitly recognized in *Ristaino*, *Aldridge*, and *Dennis v. United States*. For example, in *Aldridge* the Court noted: "[T]he right to examine jurors on the voir dire as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." 283 U.S. at 313. Similarly, in *Dennis v. United States*, the Court acknowledged that under the circumstances of that case, the defendant had the right to inquire into possible prejudices resulting from the defendant's ties to the Communist Party. 339 U.S. at 171-72. Finally, *Ristaino* indicates that the predominant concern in *Ham* was not racial bias for its own sake but the potential for racial bias to deny the defendant a trial by a fair and impartial jury in the particular circumstances of Ham's case.

This principle also emerges clearly and unmistakably from *Sheppard v. Maxwell*, *Irvin v. Dowd*, and their progeny, all of which deal with adverse pretrial publicity. In those cases, it was the tone, content and pervasiveness of the publicity that denied the defendants the right to a fair and impartial jury. *See Nebraska Press Association v. Stuart*,

427 U.S. at 554-55 ("jury's capacity to be impartial is shaped by the tone and extent of the publicity"). In *Gannett Co. v. DePasquale Nebraska Press* and *Sheppard*, the Court emphasized the trial judge's "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity," *Gannett Co.*, 443 U.S. at 378; *Nebraska Press*, 427 U.S. at 555; *Sheppard*, 384 U.S. at 362-63. The Court specifically indicated that a "searching questioning of prospective jurors" was a critical tool to be used by trial judges in identifying juror bias. *Nebraska Press Association*, 427 U.S. at 564;[25] *Sheppard*, 384 U.S. at 367-362.[26]

No other procedure is suitable to the task. For to restrict the *voir dire* questioning of prospective jurors – as

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[25] *See also id.* at 602 ("Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause.") (concurring opinion of Brennan, J., joined by Stewart & Marshall, JJ.); *see also United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972) (quoting *Silverthorne v. United States*, 400 F.2d 627, 637-38 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971) ("when pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the *voir dire* examination of the jurors affords a fair determination that no prejudice has been fostered.")).

[26] This, of course, is by no means a new conception. On numerous occasions, this Court has noted with approval the extensive *voir dire* utilized by Chief Justice Marshall to ferret out the impact of negative press accounts in order to secure a fair and impartial jury in Aaron Burr's 1807 treason trial. *See United States v. Burr*, 25 Fed. Case. No. 14,6925, p. 49.

was done in this case – to the inquiry whether *they* believe that whatever unspecific out-of-court information they have read and heard has indelibly prejudiced their thinking is to disable counsel from testing, and the judge from reviewing, the basis for the jurors' confidence in their own impartiality. This procedure, quite simply, removes the defendant's right to an impartial jury from the process through which all other constitutional rights are enforced: the basic process of adjudication by a judge, who determines the governing standard of constitutional law and applies it to facts openly spread on the record, subject to appropriate appellate review. It substitutes for this process one in which the enforcement of the right to an impartial jury is instead consigned to the subjective, unlearned, unexamined, and unreviewable judgments of the very prospective jurors whose partiality is in question. This is about as satisfactory as enforcing the defendant's right against coerced confessions, for example, by allowing nothing more than that defense counsel may inquire of the investigating officer, on cross-examination: "Was the confession that you took from the defendant voluntary, in your judgment?"

C. Under all the circumstances of petitioner's case, the trial judge was required to conduct an adequate *voir dire*.

The circumstances of this case reveal a constitutionally significant likelihood of bias and partiality, requiring appropriate judicial action. As the three dissenting justices of the Virginia Supreme Court noted, there was an unusual amount of pretrial publicity. The publicity not only highlighted a one-sided version of the

alleged circumstances of the crime, but contained detailed information regarding petitioner's criminal and institutional records. The stories reported statements by administrative and political officials deploring the offense, and discussed citizens' outrage that such a thing could happen in their community. The case was drawn into even more intense public scrutiny as a result of petitioner's status as an inmate and the national political climate of the moment. Office-holders and candidates used the case as a rallying call for reform. Petitioner's case came to symbolize in the press all that an already aroused public thought wrong with the penal system.

Despite the extraordinarily negative publicity and the fact that sixteen of the initial twenty prospective jurors responded affirmatively to the trial court's question whether they had "acquired any information from the news media or from any other source" regarding the offense, the trial judge refused to inquire into the nature of the information to which any of the jurors had been exposed. As his comments indicate, the trial judge apparently had convinced himself prior to trial that a fair and impartial jury could be obtained in Prince William County (and that jurors do not in any event pay much attention to press accounts regarding a case), and would not allow any questions designed to prove otherwise. He repeatedly denied defense counsel's requests for questioning regarding the content of that information. Over defense counsel's repeated and strenuous objections, he limited questioning to several general questions which asked the prospective jurors to say, whether, in spite of the unspecified information they had acquired, they could be impartial. Thus neither counsel nor the court

had any way of knowing what the jurors had read, heard, seen, or discussed.

This was especially significant in light of the fact that substantial information regarding petitioner, not introduced into evidence at the guilt phase of petitioner's trial, was published in the papers. As was noted previously, this information included, *inter alia*, his prison disciplinary record, acts of uncharged misconduct, his juvenile record and the details of his 1973 murder conviction. Furthermore, aside from the specific details included in the press accounts, the tone of the articles was relentlessly negative. Petitioner's offense was linked with crimes committed by other inmates including the then infamous Willie Horton.[27]

Some, but certainly not all, of this information was introduced at the sentencing phase of petitioner's trial. However, press coverage remained the sole source of such prejudicial allegations as the prosecution had been unable to seek the death penalty against petitioner in 1973 as a result of this Court's decision in *Furman v. Georgia*. A number of acts of uncharged misconduct

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[27] Under these circumstances, respondent cannot seriously contend that any error at the guilt-or-innocence phase of petitioner's trial was harmless. First, the trial judge charged the jury regarding a number of lesser included offenses, i.e., first degree murder, second degree murder, and involuntary manslaughter. A reasonable impartial jury could, on the basis of the evidence presented at trial, have found him guilty of one of these lesser offenses. Furthermore, it is a basic principle of due process that every defendant, no matter what the evidence against him is entitled to an impartial factfinder. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

which were not introduced at either phase of petitioner's trial were also included in various newspaper stories. The accounts also included articles and editorials regarding the victim's good character, and the fact that her death was a significant loss to the community.

Furthermore, the thrust of many of the articles was to hold out petitioner's case as a crying example of a number of broader evils. As has been referred to throughout this brief, there were numerous accounts regarding legislative and executive efforts to prevent prisoners from being permitted to work in urban areas, and citizen demands that officials involved in allowing petitioner to participate in the work release program be fired. These accounts at times intertwined petitioner's offense and the themes of the 1988 presidential and local political campaigns. Petitioner's case, in short, became part of a referendum on crime and the criminal justice system.

Certainly, under these circumstances, the essential demands of fairness embodied in the Sixth and Fourteenth Amendments required that petitioner's proposed questions, or reasonable substitutes, be asked. While it is true that jurors do not have to be totally ignorant about the facts of a case in order to be fair and impartial, *see Irvin v. Dowd*, 366 U.S. 717, 720 (1961); *Murphy v. Florida*, 421 U.S. 794 (1975), due process demands that a defendant be given an adequate opportunity to show bias. *Id.* at 800; *Irvin*, 366 U.S. at 723. Thus if the publicity taken as a whole poses a significant danger that jurors may have been influenced by prejudicial extraneous information, may have formed an opinion about the case, or may be otherwise biased or partial, the trial judge must make reasonable inquiries. *See, e.g., United States v. Davis*, 583

F.2d 190 (5th Cir. 1978); *United States v. Dellinger*, 472 F.2d 340 (7th Cir.), *cert. denied*, 410 U.S. 970 (1973); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968).

The procedures employed must provide reasonable assurance that prejudice, if present, will be discovered. This was not done in petitioner's case. The pervasive and prejudicial publicity in the unique historical context of this case demanded that the relatively unburdensome questions requested by petitioner's counsel be asked in order to accurately determine bias or partiality.[28] The

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[28] *See generally* American Bar Association, *Standards for Criminal Justice*, § 8-3.5.

The following standards govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

(b) Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability. A prospective juror testifying to an inability to overcome preconceptions shall be subject to challenge for cause no

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general questions asked by the court were simply not adequate. A juror could in good faith have answered these questions by indicating she or he was impartial without stopping to meaningfully consider the significance or firmness of impressions and opinions gained from the press accounts. Nor were these broad questions specific enough to elicit whether the jurors had gained information or formed opinions about relevant issues regarding petitioner's guilt or the appropriate punishment. *See United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) (general questions regarding bias in a case involving extensive publicity were too broad to reveal latent juror prejudice). Without adequate questioning, the trial judge was not in a position to make an independent

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> matter how slight the exposure. If the prospective juror remembers information that will be developed in the course of the trial, or that may be inadmissible but does not create a substantial risk of impairing judgment, that person's acceptability shall turn on the credibility of testimony as to impartiality. If the formation of an opinion is admitted, the prospective juror shall be subject to challenge for cause unless the examination shows unequivocally the capacity to be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

ABA Standards for Criminal Justice 8-3.5 (2d ed. 1980 & Supp. 1986). These standards were cited with approval by this Court in *Nebraska Press Association v. Stuart*, 427 U.S. at 549-50.

judicial determination of the impact of the publicity on the jurors' competence to sit in this capital case.

Petitioner does not dispute that a trial judge retains broad discretion in determining what actions are appropriate to detect juror bias, including the number and particular framing of questions. However, on these facts, the judge was obligated to do something. He did not. The judge was made aware of the pervasive and prejudicial nature of the publicity, and in fact acknowledged that there had been substantial media interest in the case. Counsel noted the exceptional nature and volume of the publicity and sought to have appropriate questions asked. The trial judge rejected these questions and thwarted petitioner's other attempts to obtain a fair and impartial jury. Not only did the court refuse to ask the questions, he denied a motion for a change of venue, denied counsel individual *voir dire*, and refused to sequester the jury during the trial. In sum, he ignored the "strong warning" issued by this Court in *Sheppard v. Maxwell* to take protective measures, *see Nebraska Press Association v. Stuart*, 427 U.S. at 553, and his actions at every turn deprived petitioner of a fair trial in a fair tribunal. *Id.* at 555 ("the measures a trial judge takes or fails to take to mitigate the effects of pretrial publicity [as designated in *Sheppard*] . . . may well determine whether the defendant receives a trial consistent with the requirements of due process").

Respondent will inevitably argue that there was no error because the jurors were asked several perfunctory questions en masse, and all but one member of the panel indicated that they could afford petitioner a fair trial. However, in cases involving prejudicial pretrial publicity,

the determination of a prospective juror's impartiality cannot be made solely on the basis of a juror's assurances that he or she would be impartial. *See Irvin v. Dowd*, 366 U.S. at 728; *Murphy v. Florida*, 421 U.S. at 800.[29] These assurances, in the face of extensive publicity and community feeling regarding a crime, are not sufficient to dispel the possibility of bias, and a trial judge has the constitutional duty to permit a defendant "to demonstrate 'the actual existence of such an opinion in the mind of a juror as will raise the presumption of partiality.' " *Murphy v. Florida*, 421 U.S. at 800 (quoting *Irvin v. Dowd*, 366 U.S. at 723); *see also United States v. Davis*, 586 F.2d 190 (5th Cir. 1978) (after being exposed to prejudicial pretrial publicity a juror "is poorly placed to make a determination as to his own impartiality"); *Delaney v. United States*, 199 F.2d 107, 112-13 (1st Cir. 1952).

At bottom, a juror's impartiality must be determined on the basis of information elicited by the court or counsel regarding the content of the publicity that the juror has been exposed to. Trial counsel sought to probe the jury for meaningful information in petitioner's case but was precluded from doing so. The court's actions prevented any information regarding a disqualifying bias from coming to light, except for the salient fact that most of the panel (and ultimately the jury that convicted petitioner and sentenced him to death) had read about the

[29] As Justice O'Connor noted in her concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 221-22: "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."

case and discussed it with other persons. The state cannot now hide behind the jurors' assurances of impartiality.[30] This would make a mockery of petitioner's right to a fair and impartial jury guaranteed by our Constitution. Because the "trial judge did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community," *Sheppard v. Maxwell*, 384 U.S. at 363, petitioner is entitled to a new trial conducted in conformity with the Sixth, Eighth, and Fourteenth Amendments.

[30] This is especially true in light of the fact that the prosecutor was responsible for much of the adverse publicity. For example, he ordered police to release reports that petitioner had been charged with an assault on another inmate. He also made public statements to the press regarding how this case demonstrated that the penal system was the "weak link" in the criminal justice system and that it revealed the need for "swifter capital punishment." Finally, he issued a statement indicating that petitioner had "confessed" to the crime.

This Court has previously warned prosecutors that their statements to the press about a case may deprive a defendant of his right to a fair and impartial jury, and that they should refrain from making any comment which may frustrate this fundamental constitutional right. *Nebraska Press Association v. Stuart*, 427 U.S. at 554-55; *see also United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1903).

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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